In the Supreme Court of the United States

October Term, 1952

No. 692

JESSE M. ALLEN, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Southern District of California (R. 20-24) is reported at 1951 A.M.C. 1316. The opinion of the Court of Appeals for the Ninth Circuit (R. 42-45) is reported at 201 F. 2d 263, 1953 A.M.C. 344.

JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 1952 (R. 45). The petition for a writ of certiorari was filed on March 30, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the special circumstances of this case, a seaman who has continued to accept disability payments under the Federal Employees' Compensation Act, as amended July 1, 1944, under an "agreement of enrollment" entered into on March 14, 1945, may disregard his irrevocable election of benefits under that Act so as to enable him to attempt to recover wages under the provisions of an earlier contract.

STATUTE INVOLVED

The Federal Employees' Compensation Act, 1916, c. 458, 39 Stat. 742, as originally enacted and effective at all times here involved, provides in pertinent part:

> Sec. 1. That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty * * *.
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> * * *
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> Sec. 7. That as long as the employee is in receipt of compensation under this Act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in

return for services actually performed, and except pensions for service in the Army or Navy of the United States.

The Act of July 1, 1944, c. 373, 58 Stat. 712, amending Section 7 of the Federal Employees' Compensation Act, provides:

> Sec. 605(a). Section 7 of the Act of September 7, 1916, entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", as amended (U.S.C., 1940 edition, title 5, sec. 757), is amended by changing the period at the end thereof to a colon and adding the following: *"Provided,* That whenever any person is entitled to receive any benefits under this Act by reason of his injury, or by reason of the death of an employee, as defined in section 40, and is also entitled to receive from the United States any payments or benefits (other than the proceeds of any insurance policy), by reason of such injury or death under any other Act of Congress, because of service by him (or in the case of death, by the deceased) as an employee, as so defined, such person shall elect which benefits he shall receive. Such election shall be made within one year after the injury or death, or such further time as the Commission may for good cause allow, and

when made shall be irrevocable unless otherwise provided by law.

STATEMENT

Petitioner was a civil service employee of the Army who served on various Army Transport vessels in different capacities up to the final rating of Chief Engineer. He was first employed under a renewable one-year written employment contract entered into on May 27, 1944, effective that day. On March 14, 1945, he entered into a new contract entitled "agreement of enrollment" (R. 1, 27), as a permanent civil service employee of the Army Transport service. Clause 7 of the first contract provided for straight wages during disability.[1] Clause 8 provided that "the Employee shall be subject to the benefits as he may be entitled to under the United States Employees' Compensation Act of September 7, 1916, as amended, for injury sustained while on the performance of his duty."

Petitioner was first assigned to the FS 411 on May 26, 1946, and served on that ship until July 8, 1947 (R. 1-2). During that service, he allegedly de-

[1] "In the event of illness or injury occasioned by his employment but not due to the Employee's misconduct, the base wages of the Employee will continue during the period of such incapacity."

Clause 7 continued: "Any such payments made shall be deemed payments on account of or in full, as the case may be, of any other compensation for sick leave to which the Employee might be entitled on account of such injury or illness" (R. 4).

veloped tuberculosis as a result of conditions on the FS 411. On July 8, 1947, he was discharged from his last voyage. Thereafter, he was returned to the continental United States. On October 9, 1947, his employment was terminated and his pay stopped. On July 26, 1948, he filed a claim for compensation under the Federal Employees' Compensation Act. On October 14, 1949, he brought his original libel under the Public Vessels Act, 1925 (46 U.S.C. 781 *et seq.*) (R. 27-30) in two counts, (1) for damages because of unseaworthiness, and (2) for maintenance money. On November 8, 1949, he filed an amended libel, adding an entirely new count, (3) for damages for breach of an alleged written contract to pay him full wages after discharge until his complete recovery.

On May 26, 1950, the Compensation Bureau awarded petitioner compensation at the rate of $89.71 a week upon his claim of July 26, 1948 (R. 35). In view of his pending suit in the district court, the award was conditioned, pursuant to the Act of July 1, 1944 (*supra,* pp. 3-4), upon petitioner's execution of an election to accept the benefits so awarded in place of the wage payments and other benefits he was claiming in his pending suit. On July 21, 1950, he executed in writing the required election. This election stated that he elected benefits under the Federal Employees' Compensation Act, as amended, "in place of any benefits (other than the proceeds of any insurance pol-

icy) under any other Act of Congress, including the Public Vessels Act, Suits in Admiralty Act, the Federal Tort Claims Act." Thereafter, on August 4, 1950, an initial check for $6,486.87 accrued compensation was issued to him and checks for $391.12 have continued to issue to him each four weeks until the present time.

Petitioner did not, however, voluntarily dismiss this suit, as his election required. The United States, therefore, moved to dismiss the libel and the district court granted the motion on the ground that petitioner's election to accept the Compensation Act benefits in place of any others barred the present action (R. 20-24).

On appeal, the Court of Appeals for the Ninth Circuit unanimously affirmed. It held that even if the provisions of the 1944 contract were carried over into the agreement of enrollment of March 14, 1945, the provisions of the Compensation Act were part of the petitioner's contract of employment. Consequently, petitioner's acceptance of benefits under Section 7 of the Act precluded wage payments during his disability, a period in which there were no "services actually performed." The court further held that the amendment of the Compensation Act by the Act of July 1, 1944, preceded and entered into the employment contract and required the petitioner to elect between compensation benefits and other payments or benefits otherwise available. The Court of Appeals rejected, as frivolous, the contention that because of peti-

tioner's need, he might retain the award and recover base wages during his illness (R. 42-45).

ARGUMENT

There is no conflict of decisions and the case is without general importance. Indeed, the case is unique in that it involves the interpretation of a special form of contract temporarily used in the Southwest Pacific theater during the last war. No similar case has ever been decided by the lower courts and no other case involving this contract or other similar forms of contract formerly used in other theaters is pending. We are advised that no similar form of contract is in use at the present time.

Petitioner's principal contention is that his right to recover is based upon the original May 27, 1944, contract. He did not, however, join the FS 411 until May 26, 1946 (R. 1-2), long after the original May 27, 1944, contract had been superseded by the enrollment agreement of March 14, 1945, and long after the original contract's one year life had expired.[2] Petitioner

[2] Clause 1 provided that the contract would run "for a period of one year from the effective date of this contract * * *".

Clause 17 provided that "The period of service covered by this contract may be extended from year to year or any part thereof upon agreement of both parties in writing prior to the completion of the one (1) year period of service under this contract, or any succeeding renewed one (1) year period or any part thereof, in which case all the conditions applying to the contract during the first year will in like manner apply to each such renewed year."

himself alleges that he became ill with tuberculosis as a result of conditions on the FS 411 (R. 1-2). At that time the terms of his employment were regulated by the enrollment agreement of March 14, 1945. Under that agreement, petitioner enrolled "in accord with the conditions prescribed by law and regulations pertinent to such service * * *." He agreed that "if the Government should exercise its right to relieve me prior to the conclusion of this term of enrollment for whatever reason, I may be disenrolled and my employment terminated at the pleasure of the Government and under such circumstances I shall have no further right or claim against the Government whatsoever, except as may be provided by law or regulations now or hereafter to be established." The Army Transportation Corps, Marine Personnel Regulations, par. 163.2, specifically provided that in the case of injury or illness not occasioned by the seaman's own delinquency or misconduct, "he will be entitled to payment of his base wages until the conclusion of the voyage, had he continued to serve upon the vessel, or until he returns to the continental limits of the United States, whichever is sooner, in conformity with prevailing maritime practice." Petitioner's voyage ended on July 8, 1947; he was returned to the United States, and thereafter his employment was terminated on October 9, 1947; and he was paid his wages, together with accrued sick and annual

leave. Under his enrollment agreement petitioner was entitled to recover no more.

Petitioner claims that the enrollment agreement of 1945 was merely an extension of the 1944 contract. Even if this were so, petitioner could not recover (*infra*, pp. 10, 11). But the fact is, as the district court found (R. 21), that the 1944 agreement had been superseded by the 1945 enrollment agreement, and the 1944 contract required a written renewal, which was never executed. Moreover, the 1945 agreement, which was self-sufficient, did not purport to be a renewal. Significantly, petitioner's own libel and amended libel both refer to the 1945 contract as a "new contract" (R. 1, 27).

The Federal Employees' Compensation Act, as amended July 1, 1944, entered into the enrollment agreement of March 14, 1945.[3] According to its terms, petitioner was required to elect whether he would sue under that Act or attempt to recover under a different Act. Its operation was entirely prospective, so that no question of the constitutionality of a retroactive application or abrogation of rights can be presented (cf. *Abilene National Bank* v. *Dolley*, 228 U. S. 1, 5), even if petitioner had had to relinquish alterna-

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[3] *Wood* v. *Lovett*, 313 U. S. 362, 370; *Farmers Bank* v. *Fed. Reserve Bank*, 262 U. S. 649, 660; *Russell Co.* v. *United States*, 261 U. S. 514, 524; *Abilene Nat. Bank* v. *Dolley*, 228 U. S. 1, 5; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 82; *Antoni* v. *Greenhow*, 107 U. S. 769, 774; *Walker* v. *Whitehead*, 16 Wall. 314, 317; *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 550.

tive rights in consequence of an election. In fact, however, petitioner has not had to forego any wage claim, since he has been fully compensated.

Even if the 1944 contract alone were to be considered the source of petitioner's libel, he is in no better position. For the Federal Employees' Compensation Act, which was specifically incorporated into and became a part of the earlier contract,[4] prohibited receipt of remuneration "except in return for services actually performed" while receiving compensation under the Act. See the opinion of the court below, R. 44; see also *Johansen* v. *United States,* 343 U. S. 427; *Dahn* v. *Davis,* 258 U.S. 421; *Gibbs* v. *United States,* 94 F. Supp. 586 (N.D. Cal.), affirmed, 200 F. 2d 197 (C.A. 9).[5]

Petitioner's suggestion that his irrevocable election was brought about by duress is untenable. The district court specifically found that there was no duress (R. 22), and Congress, in deliberately requiring an election and prohibiting recovery of wages, clearly understood that one of the important factors entering into such an election would be economic pressure on the injured person.

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[4] Clause 8 of the 1944 agreement, providing that the employee should be *subject* to the benefits of the Act, recognized that the benefits were accompanied by conditions.

[5] The petitioner also erroneously assumes that the provision in the 1944 contract—that "the base wages of the Employee will continue during the period of such incapacity"—had the effect of *continuing* wages beyond the contract period or any renewal thereof and beyond the termination of the employment, for no incapacity by March 14, 1945, or within one year of May 27, 1944, is alleged.

In any event, petitioner's employment was terminated on October 9, 1947, and he failed to file suit until October 14, 1949, or to claim wages allegedly due under a special contract, until the amended libel of November 8, 1949.[6] His claim is therefore barred by the two year statute of limitations of the Suits in Admiralty Act (46 U.S.C. 745), made applicable to this suit under the Public Vessels Act by 46 U.S.C. 782. *Phalen* v. *United States,* 32 F. 2d 687 (C.A. 2); *Sgambati* v. *United States,* 75 F. Supp. 18 (S.D. N.Y.), affirmed, 172 F. 2d 297 (C.A. 2), certiorari denied, 337 U. S. 938.

CONCLUSION

The decision below is correct. There exists no conflict of decisions. It is accordingly submitted that the petition for a writ of certiorari should be denied.

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MAY, 1953

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[6] Since the claim was entirely different, the amendment did not relate back to October 14, 1949, the date of the original bill. *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62, 67.

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